

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of K. A. WHITE, Minor.

UNPUBLISHED
December 19, 2013

Nos. 313770, 314692
Wayne Circuit Court
Family Division
LC No. 09-491177-NA

Before: JANSEN, P.J., and O'CONNELL and M. J. KELLY, JJ.

PER CURIAM.

In Docket No. 313770, respondent appeals as of right the trial court's removal order and the preliminary order authorizing a petition for temporary jurisdiction over the minor child. In Docket No. 314692, respondent directly appeals as of right the trial court's initial dispositional order in which the court determined that it had jurisdiction over the child. These cases have been consolidated for our review. We affirm.

Respondent had an extensive Child Protective Services (CPS) history that began when respondent was a minor and under the court's jurisdiction due to neglect. On December 1, 2009, petitioner obtained custody of respondent's first child because respondent, then aged 17 and homeless, was unable to provide proper care and custody. Respondent had been residing at Alternatives for Girls shelter but was unable to remain there because she did not follow the program rules. Respondent was given a case treatment plan, which included parenting classes, individual therapy, psychiatric medication reviews, life skills classes, GED preparation program, bus tokens, weekly parenting time, and infant mental health services. Respondent was to obtain and maintain suitable housing and a legal income source. At the initial stages of the proceedings, caseworkers expressed concern that respondent's past history of being neglected, which included living in various shelters and at houses of family and friends, impaired her ability to function in daily life.

Respondent gave birth to her second child in June 2010. This child initially resided with respondent in a supervised independent living program provider's home. By December 2010, respondent was not complying with her treatment plan. She missed several appointments with her infant mental health therapist, DHS worker, and independent living program worker. She missed several parent visits and was no longer attending school to complete her GED. Respondent had no money and was not attentive to her children. She was living with her mother, which jeopardized her supervised independent living placement.

In January 2011, the Lawyer-Guardian Ad Litem (LGAL) petitioned the court to take jurisdiction over respondent's second child because of respondent's neglect or abuse. At a court hearing in early 2011, respondent's therapist opined that continued psychiatric support for respondent was unnecessary; however, respondent needed to continue working with the therapist on developing coping skills and strengthening her problem solving skills. The therapist expressed concern for the second child's safety and well-being because of respondent's poor judgment and unstable childcare. In February 2011, respondent was placed at a new independent living residence with her second child. By March 2011, the home provider requested that respondent be removed from the program because she did not comply with program rules. Respondent reportedly was leaving her baby unattended and had asked a stranger that lived next door to watch him. Following the April 2011 adjudication trial, respondent's second child became a temporary court ward after the court found that respondent lacked suitable housing and adequate financial means to provide for the child. Respondent was not complying with her court-ordered treatment plan. She had left her independent living placement provider's home for more than two weeks without permission. Respondent was living in the maternal grandmother's home, which was unsuitable because of the maternal grandmother's chronic CPS issues and listing on the Central Registry. Respondent was no longer receiving financial assistance because she failed to provide required documentation. The court found that the second child was at a substantial risk to his physical health and emotional well-being due to dependency and respondent's inability to provide proper care for him.

In May 2011, petitioner expressed concern that respondent was not benefiting from services. Petitioner reported that respondent was not complying with her treatment plan. For a time, respondent's whereabouts was unknown. She missed a case coordination meeting, even though transportation was provided. She also missed a psychiatric appointment and did not attend employment support sessions. Respondent moved into the Alternatives for Girls Shelter Program but left the program two days later. She was homeless for several months.

In November 2011, the children's foster parent offered housing in exchange for \$150 in rent and help in caring for the foster parent's mother. In early January 2012, the foster parent reported that respondent was never at home to provide any care. She had not complied with household rules and was asked to move out.

By June 2012, respondent began to show some progress in her treatment plan. Respondent was pregnant with her third child, K. A. W., the child at issue in this appeal. She had begun to consistently take her medication for depression in February 2012, but discontinued use in July 2012 as directed by her psychiatrist because of the late term of her pregnancy. Respondent attended therapy sessions and her living situation had changed significantly as of mid-June when she entered South Oakland Shelter. She also attended group therapy offered through the shelter. She was progressing in completing her GED and was working with an employment support specialist to find employment.

In August 2012, respondent voluntarily left the Oakland Shelter program so she could live with K. A.'s father and be closer to her obstetrician and her children. At that time, respondent's therapist, after noting that respondent's oldest child had been in care for more than three years and her second child for 16 months, opined that "[p]ermanency is an important goal

to strive for to provide for both [children], and it is unclear as to whether or not [respondent] will be in a position to provide them with permanency by the end of the year.”

Respondent moved to Lighthouse Path, a woman’s two-year transitional shelter program in September 2012. Petitioner expressed concerns with whether respondent would remain at Lighthouse Path because of her erratic housing history. Shortly after the birth of K. A. in October 2012, petitioner sought temporary custody of him. The court issued an order to take K. A. into custody pending a preliminary hearing. The court determined that there were reasonable grounds to remove K. A. from respondent’s care under MCL 712A.2(b) and MCR 3.963(B).

Respondent argues several claims on appeal, which she contends are errors requiring reversal. First respondent contends that the trial court erred in removing K. A. from her care. Respondent asserts that the trial court did not use the proper standard when ordering his removal and that there was insufficient evidence that the newborn was at a substantial risk of harm if he remained with respondent. Respondent also argues that there was insufficient evidence for the trial court to assume jurisdiction over K. A. Lastly, respondent argues that the trial court improperly considered inadmissible evidence in deciding to acquire jurisdiction.

We review issues implicating constitutional rights, statutory requirements, and court rules de novo. *Reed v Yackell*, 473 Mich 520, 546; 703 NW2d 1 (2005). Trial court decisions in child protective proceedings are reviewed for clear error in light of the court’s findings of fact. *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004). Deference is given to the trial court’s special opportunity to judge the weight of the evidence and the credibility of the witnesses who appear before it. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). Because child-protective proceedings are treated as a single continuous proceeding, this Court may consider respondent’s argument in light of the entire record. See *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011).

Respondent first contends that the trial court applied an incorrect legal standard when ordering K. A.’s removal from her care. MCL 712A.13a(9) identifies the criteria for removing a child from a parent’s care:

The court may order placement of the child in foster care if the court finds all of the following conditions:

(a) Custody of the child with the parent presents a substantial risk of harm to the child’s life, physical health, or mental well-being.

(b) No provision of service or other arrangement except removal of the child is reasonably available to adequately safeguard the child from risk as described in subdivision (a).

(c) Continuing the child’s residence in the home is contrary to the child’s welfare.

(d) Consistent with the circumstances, reasonable efforts were made to prevent or eliminate the need for removal of the child.

(e) Conditions of child custody away from the parent are adequate to safeguard the child's health and welfare.

The trial court properly applied this statutory criterion in determining that K. A. should be removed from respondent's care and fully complied with MCR 3.963(B), which governs emergency removal orders.¹ The lower court record does not support respondent's contention that the court failed to reference the applicable legal standard. At the October 31, 2012, preliminary hearing, the trial court acknowledged that the applicable statutory requirement to lawfully remove K. A. from respondent's care was substantial risk of harm or imminent risk of harm. Moreover, the trial court made written findings using the substantial risk of harm standard in previous orders regarding respondent's older children. The trial court's clear "contrary to the child's welfare" findings were not indicia that the trial court ignored or misapplied that "substantial risk of harm" standard. MCR 3.965(C)(3) requires "a statement of findings, in writing or on the record, explicitly including the finding that it is contrary to the welfare of the child to remain at home and the reasons supporting that finding."

Here, there was sufficient evidence to satisfy all of these statutory requirements. Probable cause is the applicable standard to acquire temporary custody of a minor child. MCR 3.965(B)(11). Respondent's claim that there was a complete dearth of evidence demonstrating that K. A. faced a substantial risk of harm ignores ample evidence in a lengthy court record. First, the trial court properly found probable cause that K. A. would be in a substantial risk of harm to his life, physical health, or mental well-being if he remained in respondent's care in light of respondent's two other children being within the court's jurisdiction because of her neglect. Under the well-recognized doctrine of anticipatory neglect, the court properly considered respondent's conduct as it related to her other children when considering K. A.'s removal. See *In re Foster*, 285 Mich App 630, 631; 776 NW2d 415 (2009). At the time of K. A.'s removal, respondent's oldest child had been in foster care for more than three years, and her second child had been in care for more than 16 months. During the time the two older children were in care, the court conducted regular dispositional review hearings, at which respondent was represented by counsel. After each hearing, including the last dispositional review hearing before K. A. was removed, the court determined, as stated in its orders, that "returning the children to respondent

¹ The court determined that there were reasonable grounds to remove K. A. from respondent's care under MCL 712A.2(b) and MCR 3.963(B):

[b]ecause conditions or surroundings of the child are such as to endanger the health, safety, or welfare of he [sic] children and it is contrary to the welfare of the child to remain in the home because . . . [respondent] had other children who are temporary court wards. [Respondent] had not addressed mental health issues which were [sic] basis of their removal. [Respondent] stopped taking prescribed medication for her mental health issues when she was pregnant and has not addressed her mental health condition.

would cause a substantial risk of harm to the children's life, physical health or mental well-being." These previous determinations of substantial risk of harm were supported by extensive evidence. While it is true, as challenged by respondent as a basis for reversible error, that the order removing K. A. from respondent's custody does not specifically state a finding of "substantial risk of harm," it is clear from reviewing the hearing transcripts and other language in the court orders that such a finding was made as required by MCL 712A.13a(9). Thus, the trial court's omission of the specific phrase "substantial risk of harm" does not warrant reversal.

Respondent argues that she had complied with her treatment plan because she had recently acquired housing and cash assistance. In essence, respondent claims that she had met her treatment plan obligations and was ready to properly provide for one of her three children. This argument misses the mark. It is undisputed that respondent sporadically complied with her treatment plan. Although, in mid-2012 respondent had begun to make progress, there was sufficient evidence that she had not yet fully complied with and completed her treatment plan in October 2012, at the time of K. A.'s removal. An incomplete treatment plan is evidence of ongoing neglect. *In re Trejo*, 462 Mich 341, 360-363, 361 n 16; 612 NW2d 407 (2000).

The issues that brought respondent's children within the court's jurisdiction were her lack of sound parenting skills, along with unstable housing and finances. Respondent's treatment goals included acquiring *and maintaining* appropriate housing and income, acquiring adequate parenting skills, and achieving and maintaining emotional stability. By mid-September 2012, respondent had moved into a two-year transitional housing program and obtained financial assistance; however, crucial issues remained unresolved, including whether respondent could consistently remain in suitable housing and consistently provide financial stability for her children. The case worker testified regarding those concerns at the preliminary hearing. Respondent had a clear record of unstable housing, including twice leaving semi-independent living placements and various shelters. Thus, there was no assurance that respondent would remain in the shelter and participate in the shelter's programs that provided essential safeguards. Also, questions remained whether she had acquired the requisite decision-making and coping skills to properly parent a child. Respondent previously showed poor parental judgment by leaving her second child with a virtual stranger and not providing a baby-safe sleeping environment. It is reasonable to infer from the record that the trial court had given respondent additional time to acquire necessary parenting skills because she herself was young, immature and had lived in foster care. The trial court was faced with the issue of whether respondent had adequately progressed in the process of becoming a proper parent or whether she was unable to benefit from services. Thus, the trial court did not clearly err in finding that respondent's appropriate housing and financial assistance were insufficient to ameliorate the risks of harm to K. A. when viewed in the context of sporadic treatment plan compliance spanning more than two years. Reviewing the entire record, one is not left with a firm and definite conviction that the trial court made a mistake in finding that K. A. was at a substantial risk of harm if he remained in respondent's care.

Further, the trial court did not clearly err in finding that no provision of services or other arrangements except removal of the child were reasonably available to adequately safeguard K. A. Respondent argues that her placement with Lighthouse Path transitional housing program provided adequate safeguards for K. A. to remain in respondent's care. This argument is unpersuasive. Arguably, the transitional housing program may have had adequate safeguards.

However, there was no assurance that respondent would remain in the program given her history of homelessness and moving in and out of shelters and placements. Respondent had custody of her second child for several months following his birth because, at that time, she was residing in a semi-independent living program. That program provided oversight by a foster parent to keep the child safe from potential risks. However, respondent did not comply with the program rules, and the child was later removed from her care. Moreover, respondent had yet to demonstrate that she could consistently provide her other children with suitable housing, financial stability and sound parenting. The trial court heard testimony from two case workers, one of whom testified that K. A. would be at risk if he remained in respondent's care. That testimony, along with additional evidence in the court record, was sufficient for the trial court to reasonably conclude that K. A.'s removal was necessary. The trial court also considered placing K. A. with his father, but the father was residing with a person listed on the Central Registry, which precluded placing K. A. with him until he found other suitable housing.

There was also sufficient evidence that petitioner had made reasonable efforts to prevent or eliminate the need for removing K. A. from respondent's care. Respondent had received myriad services for more than three years, including individual counseling, parenting classes, random drug screens, substance abuse counseling, psychological evaluation, psychiatric medication reviews, life skills instruction and supervised parenting time. Respondent was also offered independent living skills training that included housing, self-care, budgeting, housekeeping, and grocery shopping. Respondent had been provided with monthly bus cards to assist with transportation to meet the goals outlined in her treatment plan. Respondent was referred to IMH therapy through the Development Center where she had also received psychiatric services and employment assistance. Additionally, respondent was provided with intensive services when her case was selected for the "Baby Court" docket. These intensive services allowed petitioner to work with respondent on a more one-to-one basis. Respondent had been offered GED preparatory classes and employment and housing leads. Further, case workers were available for case conferences via phone or in person, along with quarterly team meetings and monthly face-to-face visits. Despite these extensive services, caseworkers and the court concurred that respondent was not ready to have custody of any of her children.

We conclude that the trial court did not clearly err in removing K. A. from respondent's care. There was sufficient evidence that respondent's custody of K. A. presented a substantial risk of harm to the child as required under MCL 712A.13a(9). The trial court's order to place the child in temporary custody met the requirements of MCL 712A.13a(9).

The trial court also did not clearly err in finding sufficient evidence to acquire jurisdiction over K. A. A trial court's decision to exercise jurisdiction is reviewed for clear error in light of the court's findings of fact. *In re BZ*, 264 Mich App at 295. Pursuant to MCL 712A.2(b), a trial court may exercise jurisdiction over a minor under either of the following circumstances:

- (1) Whose parent or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals, who is subject to a substantial risk of harm to his or her mental well-being, who is abandoned by his or her parents, guardian, or other custodian, or who is without proper custody or guardianship.

* * *

(2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, or other custodian, is an unfit place for the juvenile to live in.

The trial court may exercise jurisdiction if the factfinder determines by a preponderance of the evidence that the allegations in the petition establishes that a child comes within the statutory requirements of § 2(b). *In re Brock*, 442 Mich 101, 108-109; 499 NW2d 752 (1993); MCR 3.972(C)(1) and (E).

The record shows, by a preponderance of the evidence, that K. A. was at a substantial risk of harm and that respondent, by reason of neglect, was unable to provide a proper home for K. A. The proofs that supported the trial court's determination to take K. A. into temporary custody were also of sufficient weight to exercise jurisdiction over K. A. at adjudication. At adjudication, the trial court heard testimony from two witnesses for petitioner and took judicial notice of the entire court record, including all matters relating to respondent's two older children. The record does not support respondent's claim that the trial court assumed jurisdiction over the child solely because his two older siblings were in foster care. Further, respondent misconstrues the court record when claiming that there was uncontroverted evidence that she had remedied the concerns that originally caused the older siblings to be placed in foster care — primarily unstable housing and mental health issues. A parent's treatment of one child is probative of how he or she is likely to treat another child and is thus admissible and properly considered by the court. *In re Jackson*, 199 Mich App 22, 26; 501 NW2d 182 (1993); *In re LaFlure*, 48 Mich App 377, 392; 210 NW2d 482 (1973). However, anticipatory neglect does not mandate a finding of neglect. In some circumstances, a court may find that a parent is able to properly care for a child even though another child is a temporary court ward.

Here, the trial court properly considered that respondent's two older children were in foster care and her progress in previously ordered treatment plans. The evidence showed that respondent had sporadically complied with her treatment plan. She was unable to properly care for her two older children despite receiving myriad services for more than 15 months. A case worker testified that respondent was not benefiting from services. Failure to comply with a treatment plan is evidence of continued neglect. *Trejo*, 462 Mich 360-363.

Respondent's reliance on *In re Smebak*, 160 Mich App 122; 408 NW2d 117 (1987), for the proposition that a trial court may not use the anticipatory neglect doctrine to automatically find that a parent is currently unfit, is misplaced. The lower court record reflects that the trial court made further evidentiary inquiry into respondent's ability to provide suitable care specifically for K. A. The proofs showed that respondent's issues had not been fully resolved. Although respondent had made some recent progress, at the time of adjudication two case workers testified that there were continuing issues with her housing, mental stability and finances. Progress and resolution are not synonymous. Respondent was residing at a transitional living shelter with a program that had safeguards for K. A., but there was no assurance that she would remain there and fully participate in the program.

There were also serious questions about respondent's parenting skills and persistent poor judgment, as demonstrated during two unsupervised visits in November and December 2012.

Respondent's actions at that time also confirmed that the trial court's concerns during the preliminary hearing phase were well-founded. During one of the first unsupervised parenting time opportunities just weeks after the preliminary hearing concluded, respondent chose to take her three children to a six-hour hospital visit with K. A.'s paternal grandmother, rather than take the children back to her Lighthouse Path home as instructed, and she did not provide her two older children with adequate food during the visit. During a second visit in December 2012, respondent did not change her second child's diaper for four hours and needed to be redirected regarding K. A.'s safety.

Additionally, there was testimony that respondent's mental health had deteriorated within the previous month and that she had missed three medication reviews. Respondent's therapist testified that she had current concerns about respondent's self-care associated with depression.² Also, the case worker testified that respondent had minimal financial resources. Respondent's argument that there was no evidence of respondent directly harming K. A., *in utero* or placing him in an unfit environment, is unpersuasive.

Lastly, respondent claims that the trial court abused its discretion when it relied on inadmissible hearsay testimony when deciding to acquire jurisdiction over K. A. Specifically, respondent claims that a case worker's testimony regarding respondent's history of leaving her child for a lengthy period with babysitters was inadmissible hearsay. Respondent also claims that her therapist's testimony regarding respondent's unsupervised visits with her older children after K. A.'s removal was irrelevant and not based on personal knowledge. These claims are groundless. A trial court's evidentiary rulings are reviewed for an abuse of discretion when properly preserved. *In re Utrera*, 281 Mich App 1, 15; 761 NW2d 253 (2008). A trial court abuses its discretion when its outcome falls outside the range of principled outcomes. *Id.*

The challenged testimony concerned information that was already a part of the lower court record, having been admitted in earlier proceedings. Because child-protective proceedings are treated as a single continuous proceeding, the trial court could consider respondent's evidentiary objections in light of the entire record. *In re LaFlure*, 48 Mich App at 391. Moreover, there was no objection to the trial court's taking judicial notice of the court's legal file, and the court specifically referenced the case record concerning respondent's two older children when taking judicial notice. A trial court may take judicial notice of the files and records of the court in which he or she presides. *Knowlton v City of Port Huron*, 355 Mich 448, 452; 94 NW2d 824 (1959); *Snider v Dunn*, 33 Mich App 619, 625; 190 NW2d 299 (1971). The record does not show, as respondent contends on appeal, that judicial notice was limited to prior orders of the court, findings of fact, conclusions of law, and exhibits which had been previously admitted in the proceedings. Much of the testimony to which respondent objects was merely a restatement of information contained in exhibits previously admitted into evidence, without

² Respondent's argument that her depression symptoms were due to petitioner's improper removal of K. A. are too speculative for this Court to consider given the evidence of her longstanding issues with depression.

respondent's objection, at the November 5, 2012, dispositional review hearing. Respondent had notice and the opportunity to object or otherwise respond to the information at earlier hearings and at the time judicial notice was taken; thus, this argument is without merit.

Reviewing the entire court record, one is not left with a definite and firm conviction that the trial court mistakenly found that respondent was unable to provide proper care of K. A. Respondent was unable to care for her two older children and had not fully complied with her treatment plan. Under the doctrine of anticipatory neglect, as well as additional evidence as it related directly to K. A., the trial court did not clearly err in removing K. A. from respondent's care or in exercising jurisdiction over the child.

Affirmed.

/s/ Kathleen Jansen
/s/ Peter D. O'Connell
/s/ Michael J. Kelly